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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION, Plaintiffs, vs. PHILIP B. WAGNER and WILLIAM SIMON, Defendants.	NO. SACV91-395 GLT (RWRX) MEMORANDUM OF POINTS AND AUTHORITIES OF WILLIAM SIMON IN OPPOSITION TO MOTION OF PLAINTIFF ESTATE OF ECKERT FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL DATE: November 1, 1993 TIME: 10:00 a.m. PLACE: Courtroom of Honorable Gary L. Taylor: (Filed Oct. 14, 1993)

Defendant William Simon submits the instant memorandum of points and authorities in opposition to the Motion of plaintiff Estate of Eckert, served on October 4, 1993, for an extension of time to file a notice of appeal

from judgment entered in favor of defendant Simon (and defendant Wagner).

That "Judgment Pursuant to Federal Rule 56" in favor of the defendants was signed and filed on August 30, 1993, and was entered on September 1, 1993. Pursuant to Rule 4(a)(1), F.R.App.P, the notice of appeal was required to be filed within thirty (30) days of September 1, 1993, that is, on or before Friday, October 1, 1993. That 30-day period for filing of a notice of appeal is mandatory and jurisdictional. *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 98 S. Ct. 556 (1978); *Price v. Seydel*, 961 F. 2d 1470, 1473 (9th Cir. 1992).

Notwithstanding the lapse of the 30-day jurisdictional period for the Estate of Eckert to file a notice of appeal, the Estate of Eckert asks this court to now extend the time for filing based upon the alleged "good cause" that it needs additional time to consider whether to pursue an appeal. That purported "good cause" basis to seek to extend the time to file a notice of appeal is not cognizable by the appellate rules and should be summarily rejected as a matter of law.

Pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure, the Court, upon a showing of excusable neglect or good cause, may, on proper motion timely made, extend the time for filing of a notice of appeal for a period of thirty days following the prescribed time or for 10-days following entry of the Order granting the notice, whatever occurs later. Under Rule 4(a)(5), the request for such an extension within which to file a notice of appeal based upon "good cause" *must be filed before* the expiration of the jurisdictional 30-day

appeal period. *See: Pearson v. Gato*, 933 F. 2d 521, 524 (7th Cir. 1991). As stated in *Pearson*:

> "The advisory notes to Rule 4(a)(5) make clear that a request for an extension of time filed *before* [emphasis is original] the notice of appeal is due may be granted for good cause, but a request for extension filed *after* [emphasis is original] the notice is due may only be granted under the higher excusable neglect standard. [Citations omitted.]"

Accord: *Allied Steel, General Contractor v. City of Abilene*, 909 F. 2d 139, 143 and ftnt. 3 (5th Cir. 1990); *Park-Chapley Constr. Co. v. Cherrington*, 865 F. 2d 907, 909-11 (7th Cir. 1989); *State of Oregon v. Champion Intern. Corp.*, 680 F. 2d 1300, 1301 (9th Cir. 1982).

Here, the Estate of Eckert motion for an extension of time within which to decide whether to file a notice of appeal is based solely on an alleged "good cause" submission. Even assuming "good cause" (in fact, not existent herein), the Estate of Eckert motion was *not* filed within the mandatory jurisdictional 30-day period for the filing of the notice of appeal. Therefore, this court should not, and indeed may not, extend the time for filing a notice of appeal on that basis. A "good cause" motion *must* be filed within the mandatory 30-day notice of appeal period, to be timely and to be considered by the Court. Here, the Estate of Eckert motion was not timely filed and *no* showing of cause can justify an extension. Nor can a mere request for more time to conisder [*sic*] filing a

notice of appeal constitute just cause. As stated in *Allied Steel* (*supra.*):

> "Almost any party to any dispute could argue truthfully that unique or extraordinary circumstances had distracted its attention. [citations omitted]. District Courts have no principled means of distinguishing among circumstances. Requiring courts constantly to adjudicate claims of extraordinary or unique circumstances would defeat the purpose of the time limitation in Rule 4(a)(1) – to provide a definite point at which, in the absence of a notice of appeal, litigation will cease. [citation omitted]. Rule 4(a)(5) clearly indicates that *potential appellants may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder their options.* [emphasis added]."

The "good cause" motion of the Estate of Eckert is based solely upon a request to permit a further period for Eckert to "ponder its options". That basis for an extension of time, sought *after* the expiration of the 30-day appeal period, simply is not recognized by the appellate rules, and the motion of the Estate of Eckert should be rejected herein.

Eckert's motion to obtain an extension of time to file a notice of appeal based on good cause is untimely and not cognizable under Rule 4(a)(5).[1] Consequently, that motion should be denied.

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[1] Nor has the Estate of Eckert attempted to make, or made, any showing to satisfy the higher standard of "excusable neglect." It is clear that inadvertence or mistake of counsel does not constitute excusable neglect. *See: State of Oregon v. Champion*

Dated: October 14, 1993

Respectfully submitted,

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Intern. Corp., 680 F. 2d 1300, 1301 (9th Cir. 1982); *Sprout v. Farmers Insurance Exchange*, 681 F. 2d 587 (9th Cir. 1982). Moreover, even inadvertent non-compliance with the rules of appellate procedure, does not, without more, constitute excusable neglect for purposes of Rule 4(a)(5). *Rivera v. Puerto Rico Telephone Co.*, 921 F. 2d 393, 395-396 (1st Cir. 1990) (Failure to name multiple appealing parties in notice of appeal by using name "Elias Rivera, et al.", *not* excusable neglect. No appeal rights as to non-named parties.).